INDEX

CITATIONS

Cases:

742-126—64——1

Cases—Continued

Statutes—Continued

Internal Revenue Code of 1954—Continued

In the Supreme Court of the United States

OCTOBER TERM 1964

No. 13

UNITED STATES OF AMERICA, PETITIONER

v.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY, AND CLEVELAND JOHNS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 55–69) is reported at 322 F. 2d 292.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1963 (R. 70). Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 4, 1963. The petition was filed on that date and granted on January 6, 1964 (R. 72; 375 U.S. 962). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory presumptions established by Section 5601(b) (1) and (2) of the Internal Revenue Code, as here applied, are valid under the Due Process and the Self-Incrimination Clauses of the Fifth Amendment.

STATUTE INVOLVED

The relevant portions of Section 5601 of the Internal Revenue Code of 1954, as amended (26 U.S.C.), 72 Stat. 1275, 1398–1399,[1] read as follows:

> (a) OFFENSES.
>
> Any person who—
>
> (1) UNREGISTERED STILLS.
>
> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a); or
>
> * * * * *
>
> (4) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.
>
> Carries on the business of a distiller or rectifier without having given bond as required by law; * * *
>
> * * * * *
>
> shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, for each such offense.
>
> (b) PRESUMPTIONS.
>
> (1) UNREGISTERED STILLS.
>
> Whenever on trial for violation of

[1] Related provisions, not directly involved here, are printed in the Appendix, *infra*, pp. 39–41.

subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(2) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.

Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, respondents were convicted on the first three counts of a four count indictment (R. 1-2)[2] charging illegal distilling

[2] The trial court directed an acquittal on Count 4, which charged that the respondents worked in a distillery in which no sign was placed and kept showing the name of the person engaged in the distilling and denoting the business in which he was engaged (R. 2, 36, 41, 47).

operations in violation of the Internal Revenue Code (R. 4, 48–50). Count One charged respondents with possession, custody and control of a set-up, unregistered still and distilling apparatus (26 U.S.C. 5601(a)(1)); Count Two, with carrying on the business of a distiller without having given bond as required by law (26 U.S.C. 5601(a)(4)); and Count Three, with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed on liquor (26 U.S.C. 5602) (R. 1–2). Respondents were sentenced generally on the three counts: Barrett to imprisonment for one year and one day, Gainey to imprisonment for 15 months, and Johns to imprisonment for two and one-half years (R. 48–50).

The evidence adduced by the government showed that, at about 4:40 a.m. on the morning of March 25, 1960, while federal and State revenue agents were maintaining surveillance of an unregistered still in Dooly County, Georgia, respondents drove up to the site in a truck with the headlights off. When the truck stopped, respondent Gainey got out carrying a flashlight. He started to run when he saw the officers and was arrested after a short chase. The other respondents rolled up the windows of the truck, locked the door and tried to back out of the area. They were arrested before they could escape (R. 5–6, 16–17, 19, 27–29).

In the truck the officers found a full cylinder of butane gas, which was the "same type" as eight other cylinders found at the site of the still (R. 6, 20). The still was being fired with butane gas and consisted of two 2,250 gallon metal tanks capable of producing

between 450 and 500 gallons of whiskey; 4500 gallons of mash was also found at the site (R. 6, 17–18). The officers testified that, shortly after his arrest, respondent Barrett admitted that the still belonged "to all of them" and that they "had set it up a few days before" (R. 7–8, 12–13, 30–31). The owner of the property on which the still was located testified that respondent Johns had offered him "$15 a week" to use his land to "do a little business" (R. 21).

In commenting on the evidence and the consideration the jury should give the presumptions provided by 26 U.S.C. 5601(b) (1) and (2), *supra*, pp. 2–3, the trial judge gave the following instructions (R. 44–45):

> There is one other matter which I should mention. I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, and such an innocent man ought never to be convicted, but presence at a distillery, if you think these men were present, is a circumstance to be considered along with all the other circumstances in the case in determining whether they were connected with the distillery or not. Did they have any equipment with them that was necessary at the dis-

tillery? What was the hour of day that they were there? Did the officers see them do anything? Did they make any statements?

It is your duty to explore this case, analyze the evidence pro and con fairly. Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

And under a statute enacted by Congress a few years back, when a person is on trial for possession of a non-registered distillery, as in this case, or for carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the defendant is shown to have been at the site of the place at the time when the distilling apparatus is set up without having been registered, or where and at the time when the business of a distiller was engaged in or carried on without bond having been given, under the law such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.

Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails

> to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.

The court of appeals held that the statutory presumptions, as embodied in the instructions of the trial judge, are invalid. After stating that the provisions give "short shrift" to the defendant's constitutional privilege not to take the witness stand (R. 59–60; 322 F. 2d at 296), the court held that sections 5601(b) (1) and (2) violate the due process clause of the Fifth Amendment because, in its view, the facts on which the presumptions are based (presence at a set-up, unregistered still or presence at the still site at the time when the business of a distiller or rectifier is being engaged in) do not reasonably justify an inference of the ultimate facts presumed (possession of the unregistered still, or carrying on the business of a distiller without posting bond) (R. 67; 322 F. 2d at 300). The court then remanded the case for a new trial on both counts, noting that there was sufficient independent evidence to support a jury verdict on these two counts (R. 68–69; 322 F. 2d at 301).[3]

[3] As to Count 3—which charged respondents with carrying on the business of a distiller with intent to defraud the United States of taxes on distilled spirits—the court reversed on the grounds (1) that the trial court's instructions had failed to make clear that the statutory presumptions did not apply to this count and (2) that the evidence did not show any intent to defraud (R. 67–68; 322 F. 2d at 300).

In our petition for a writ of certiorari, we did not seek review of the reversal on this count.

ARGUMENT

INTRODUCTION AND SUMMARY

At issue here is the constitutional validity of two of five so-called statutory "presumptions" added to the alcohol tax chapter of the Internal Revenue Code when it was revised in 1958.[4] Another of these provisions (together with the first of those in this case) is involved in *United States* v. *Romano*, No. 172, presently pending on the government's petition for a writ of certiorari to the Court of Appeals for the Second Circuit (which held the provisions unconstitutional).[5] We are presently concerned with Sections 5601(b)(1)[6] and 5601(b)(2), which the court below struck down as violating the Due Process Clause of the Fifth Amendment.

The critical difference between the reasoning of the court below and the government's view of this case lies in the definition of the substantive offenses. We agree that if each of the crimes charged covers only the narrow range of conduct supposed by the court

[4] The Excise Technical Changes Act of 1958, 72 Stat. 1275, recodified and somewhat abbreviated a number of disparate provisions involving federal excise taxes, including those in Chapter 51 of the Internal Revenue Code dealing with taxes on alcohol. The several presumptions referred to were enacted as part of that revision.

The two presumptions directly involved in this case, together with the substantive penal provisions to which they refer, are set out as "States Involved," *supra*, pp. 2–3. The other three statutory presumptions, and the related statutes, are printed in the Appendix, *infra*, pp. 39–41.

[5] See *United States* v. *Romano*, 330 F. 2d 566.

[6] Except as otherwise noted, all section references hereinafter are to the Internal Revenue Code of 1954, as amended (26 U.S.C.).

below, then the statutory presumptions may well be unconstitutional because the facts required to be proved may not rationally support the inference that the respondents in fact engaged in such activities. In our view, the crimes of carrying on the business of a distiller without bond (section 5601(a)(4)) and possession of an unregistered still (section 5601(a)(1)) are each broad enough to cover, *either as principal or as accessory*, the activities of any person at all likely to be present at the site of an operable still. In the latter event, the rebuttable presumptions are constitutional under the standards established by this Court and applied by the court below.

Because the government's case is there strongest, we deal first with Count Two—the substantive offense of carrying on the business of a distiller without bond (section 5601(a)(4)) and the accompanying presumption that anyone present at a place where and time when the business is being carried on is engaged in, or is assisting, the operation (section 5601(b)(2)). We preface the argument by recalling the constitutional principle that a rebuttable presumption is valid if the facts giving rise to the presumption can rationally be said to permit finding by inference the additional facts constituting the offense. We then show that the offense of carrying on the business of a distiller without bond is made out, under established precedents, if the prosecution proves that the defendant was in fact present at an illicit "going" still either as employee, or supplier, or purchaser, or in any other capacity connected with the illegal operation. Since no one else is at all likely to be present at such a

clandestine undertaking, drawing an inference of guilt from unexplained presence is entirely reasonable.

We turn next to the offense charged in count one—possession of an unregistered still. The court below held that the limits of that offense today are those established by *Bozza* v. *United States*, 330 U.S. 160, before the enactment of the presumption in 1958. We believe, however, that the obligation to sustain an act of Congress whenever possible, requires giving effect to the congressional intention to overrule *Bozza*—which is evident both in the enactment of the presumption and the accompanying legislative history—by redefining the substantive offense of illegal possession so as to cover all those persons who are on the premises and contributing to the maintenance or operation of the unregistered still. If the substantive offense is that broad, the presumption rests upon an inference which is entirely rational because no one else is likely to be found there.

Each of the respondents was given a general sentence upon all three counts, with less punishment than would be authorized upon any one count. Accordingly, if either count one or count two is sustained, the judgment below must be reversed and that of the district court affirmed. *Claassen* v. *United States*, 142 U.S. 140, 146–147; *Emspak* v. *United States*, 349 U.S. 190, 195, fn. 9.[7]

[7] Because the issue was not presented in our petition for certiorari, being of no general importance, we are in no position to argue that the convictions should be affirmed on count three alone.

I

SECTION 5601(b)(2) IS CONSTITUTIONAL

A. A REBUTTABLE PRESUMPTION IS CONSTITUTIONAL IF THE FACTS GIVING RISE TO THE PRESUMPTION SUPPORT A RATIONAL INFERENCE THAT THE DEFENDANT HAS IN FACT ENGAGED IN THE UNLAWFUL CONDUCT TO BE PROVED.

Section 5601(a)(4) provides that any person who "carries on the business of a distiller" without giving bond shall be guilty of a felony. Section 5601(b)(2) provides that proof that any person was present "at the site or place where, and at the time when," the business of a distiller was carried on without bond, "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury."

The presumption is rebuttable and, so far as the jury is concerned, merely permissive. As the trial judge properly explained to the jury in the present case, proof of the defendant's presence while the business is being carried on, in the absence of explanation, permits conviction because the jury *may* infer from the proof of presence the conclusion that the defendant was involved in carrying on the business as either principal or accessory (R. 45):

> Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall

be deemed in law sufficient to authorize a conviction, but does not require such a result.

See also *United States* v. *Ivey*, 310 F. 2d 227, 229 (C.A. 4), certiorari denied, 372 U.S. 929. The burdens of introducing proof of each element of the offense and of persuading the jury beyond a reasonable doubt remains upon the government at all times. The court had already charged the jury on the burden of proof (R. 40) and the elements of the offense (R. 41), and had discussed the drawing of factual inferences from proof of presence (R. 44–45):

> * * * I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, and such an innocent man ought never to be convicted, * * *.
>
> * * * Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

Thus, the presumption created by section 5601(b)(2) amounts to no more than a declaration of a factual inference which Congress authorizes juries to draw from proven circumstances. Such a presumption is to be sharply distinguished from conclusive presumptions that create a new rule of substantive law[8] or presumptions that shift the burden of introducing evidence merely because of alleged convenience of proof.[9]

The explanation that overcomes the force of the presumption need not come from the defendant personally or even from his evidence. The explanation may be suggested by any evidence of the facts and circumstances, coming from any source (including the government's own witnesses), that explains how an innocent man happened to be there. Or the jury may reject the presumption because it is satisfied that proof of presence, taken in conjunction with all the other circumstances, will not support an inference that the defendant was, beyond a reasonable doubt, guilty of conduct constituting him a principal or accessory in the substantive offense. The judge so charged the jury in the present case (R. 38–45; see, especially, R. 44–45).

In sum, the net effect of section 5601(b)(2) is twofold. First, when presence is proved and is unexplained, the judge must submit the case to the jury despite a motion for acquittal upon the ground that there is insufficient evidence of guilt. Similarly, he

[8] See, *e.g.*, *Heiner* v. *Donnan*, 285 U.S. 312, 327–329; *United States* v. *Provident Trust Co.*, 291 U.S. 272, 281–285.

[9] See, *e.g.*, *Morrison* v. *California*, 291 U.S. 82, 90–97.

must take the jury's verdict against a motion for judgment *non obstante*. Any prior cases holding that proof of unexplained presence is not sufficient to carry a case to the jury are over-ruled.[10] Second, the judge is to instruct the jury that from proof of presence it *may* find that the defendant committed the crime alleged. But the power to convict is not to be exercised whimsically. The jury must address

[10] Actually, there was little to overrule. Indeed, even without the aid of the statute, an inference of participation in the business of running a still under similar circumstances had been recognized—principally by decisions in the Fourth Circuit. See *Barton* v. *United States*, 267 Fed. 174, 175–176 (C.A. 4); *Harding* v. *United States*, 182 F. 2d 524 (C.A. 4). There were, it is true, decisions (principally in the Fifth and Third Circuits) saying that "mere presence at a still site cannot support a conviction for violation of the liquor laws relative to the still." *Fowler* v. *United States*, 234 F. 2d 697, 699 (C.A. 5); see, also, *Vick* v. *United States*, 216 F. 2d 228, 231–232 (C.A. 5); *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5); *Girgenti* v. *United States*, 81 F. 2d 741, 742 (C.A. 3); *Grunwald* v. *United States*, 94 F. 2d 952, 953 (C.A. 3), certiorari denied, 303 U.S. 663. But, in a number of these cases, the appellate court was of the view that presence had been satisfactorily explained. See note 18, *infra*, p. 29. In some, the charges did not include that of carrying on the business of a distiller. See, *e.g.*, *Graceffo* v. *United States*, 46 F. 2d 852 (C.A. 3); *Girgenti* v. *United States*, 81 F. 2d 741 (C.A. 3); *Cantrell* v. *United States*, 158 F. 2d 517 (C.A. 5). And in others the statement that presence alone is insufficient was made in circumstances unnecessary to the disposition of the case. Thus, in *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5), the court of appeals found that all the evidence, including presence, was sufficient to support the jury verdict. To the same effect: *Grunwald* v. *United States*, 94 F. 2d 952, 953 (C.A. 3); *Spencer* v. *United States*, 295 F. 2d 536, 537 (C.A. 5); *Matthews* v. *United States*, 217 F. 2d 409, 411 (C.A. 5); *Fowler* v. *United States*, 234 F. 2d 697, 699 (C.A. 5); cf. *United States* v. *Freeman*, 286 F. 2d 262, 265–266 (C.A. 4).

itself to the propriety of the inference in the particular case. All that Congress has done, in effect, is to substitute for judge-made law its statutory views of what inferences are normally permissible.

The primary test of the constitutionality of such a presumption is whether Congress, in the light of the knowledge and experience available, acted arbitrarily in concluding that a jury could rationally derive from the facts giving rise to the presumption an inference that the defendant actually engaged in conduct constituting the crime. Under the procedural safeguards of the Bill of Rights, "where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged" (*Tot* v. *United States*, 319 U.S. 463, 473 (concurring opinion)); "* * * a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.* at 467–468. On the other hand, if the circumstances of life as we know them show that it may be rationally permissible to infer from the fact proved that the defendant has also in fact engaged in conduct constituting the crime charged, then the requirements of due process are satisfied even though the inference is not one that a jury ought to draw in every particular case. For, in that event, the government would have introduced evidence which tended to prove each element of the crime. See, in addition to *Tot v. United States, supra*, the earlier decisions in *Mobile, J. & K. C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43;

Luria v. *United States*, 231 U.S. 9, 25–26; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Yee Hem* v. *United States*, 268 U.S. 178, 184; *Casey* v. *United States*, 276 U.S. 413, 418.

Few, if any, presumptions which satisfy the foregoing requirement will violate the privilege against self-incrimination. Situations frequently develop (almost inevitably, in cases of circumstantial evidence) in the course of criminal trials in which the facts proved by the prosecution will sustain an inference of guilt and thus put the defendant, who best knows any explanation that will dispel the inference, to a choice between coming forward with the explanation and remaining silent at his peril. See *Rugendorf* v. *United States*, 376 U.S. 528, 536–537; *Holland* v. *United States*, 348 U.S. 121, 138–139. The case is no different in principle where a statutory presumption declares the right of the jury to draw the rationally permissible inference, thus binding the court upon a motion to acquit before or after verdict. For the usual case the full answer to any argument based upon the self-incrimination clause was given in *Yee Hem* v. *United States*, *supra*, 268 U.S. at 185, in which the presumption created by the Narcotic Drugs Import and Export Act of 1909 (now 21 U.S.C. 174)—the model for the provisions in suit[11]—was sustained:

[11] That form—"* * * such possession [or presence] shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession [or presence] to the satisfaction of the jury"—derives from Section 4 of the Smuggling Act of 1866, 14 Stat. 178, 179 (presently 18 U.S.C. 545). The latter provision has also been upheld against the charge that

> The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

See, also, *Mobile, J. & K. C. RR.* v. *Turnipseed, supra; Luria* v. *United States,* 231 U.S. 9, 25–26; *Rossi* v. *United States,* 289 U.S. 89, 91–92; *Morrison* v. *California,* 291 U.S. 82, 88–89, 90–91; *United States* v. *Fleischman,* 339 U.S. 349, 361–363; *Holland* v. *United States,* 348 U.S. 121, 138–139; *Rugendorf* v. *United States,* 376 U.S. 528, 536–537.

The exceptional case in which the presumption may be unconstitutional even though there is a rational inference from the evidence giving rise to the presumption of the ultimate fact to be proved is suggested by

---

it violates the privilege against self-incrimination. *Friedman* v. *United States,* 276 Fed. 792, 794–795 (C.A. 2); cf. *United States* v. *Goldstein,* 323 F. 2d 753, 754 (C.A. 2).

Tot v. *United States*, *supra*, where the statute was so drawn as to require every defendant who wished to testify in rebuttal of the presumption, to admit the commission of other crimes. In *Tot* the presumption that the firearm in defendant's possession had been received in interstate commerce arose only if the defendant was shown to have been convicted of a crime of violence or to be a fugitive from justice. Since a defendant's own testimony would normally be necessary to overcome the presumption, the statute virtually compelled every defendant who wished to give an innocent explanation of his possession to submit himself to cross-examination that would surely be prejudicial to his defense.

No such case is presented here. The statute is not drawn in such a way that the presumption arises *ex hypothesi* only against defendants vulnerable upon cross-examination. Nor is the statute so drawn that the defendant is always put to a choice between allowing the presumption to operate and confessing his guilt of some other offense. Whatever its scope, the second test of constitutionality applied in *Tot* has no relevance to the instant case.

B. PROOF OF PRESENCE AT THE SITE OF AN ILLICIT "GOING" STILL GIVES RATIONAL SUPPORT FOR THE INFERENCE THAT THE DEFENDANT IS ENGAGED IN CONDUCT MAKING HIM GUILTY, AS EITHER PRINCIPAL OR ACCESSORY, OF THE CRIME OF CARRYING ON THE BUSINESS OF DISTILLER WITHOUT BOND

Since the constitutionality of section 5601(b)(2) depends upon whether proof of the defendant's presence gives rise, in fact, to what Congress might rationally consider a permissible inference that he has en-

gaged in some form of conduct constituting the substantive offense charged, it is essential to analyze with some care the elements of the substantive crime. For the rationality of the authorized inference depends not only upon logical applications of the lessons to be drawn from experience but also upon the ultimate facts to be proved.

1. The substantive offense

The crime proscribed by section 5601(a)(4) is—

> Carr[ying] on the business of a distiller or rectifier without giving bond as required by law.

The court of appeals took an impermissibly narrow view of that offense. After holding that presence at the site of an unregistered still would not support an inference of possession in the narrow sense of custody or control, the court went on to say (R. 67) that section 5601(b)(2) must, *a fortiori,* fall because—

> Certainly, there is far less ground for the probability of this inference—which, in fact, is a double one, from presence to possession to carrying on a business without bond—than there is for the first one.

The court's assumption that one cannot be guilty of carrying on business of a distiller without bond without first being proved guilty of possession of an unregistered still is directly opposed to *Bozza* v. *United States,* 330 U.S. 160. In that case this Court squarely held that proof that the defendant helped to make alcohol for the main-mover in the interprise, and occasionally carried it away, was ample support for a conviction of carrying on the business of a dis-

tiller with intent to defraud the United States, even though the same proof was not evidence of the narrower offense of possession. Thus the class of persons present at a still who may be guilty of engaging in the business of a distiller is broader, not narrower, than the class who may be guilty of possession as defined in *Bozza*. The court below evidently forgot that anyone who aids or abets may be convicted as a principal. And anyone who assists in the operation or maintenance of a clandestine still, at the still, is obviously aiding and abetting the illicit operation. 18 U.S.C. 2.

Section 5601(a)(4) accordingly encompasses many more classes of persons than the court below supposed. Not only has it long been settled that employees of every description are equally liable with the owner or operator for engaging in illegal distilling, as held in *Bozza* (albeit with respect to the offense of "carrying on the business of a distiller * * * with intent to defraud the United States of the tax [due]"),[12] but the same ruling has been made under section 5601(a)(4) against one who was caught tending a still where the "main mover" in the illegal transaction testified that the defendant came out "[o]nce in a while" to help him. *Occinto* v. *United States*, 54 F. 2d 351, 353 (C.A. 8); *Cvitkovic* v. *United States*,

[12] The difference between the two provisions is of no importance here, since both require the initial finding that the defendant is helping to "carry on the business of a distiller." Indeed, as the dissenting opinion in *Bozza* points out (330 U.S. at 168 and n. 2), greater involvement might be called for before one may be said to be aiding in defrauding the government.

41 F. 2d 682, 684 (C.A. 9), certiorari denied, 282 U.S. 871; see, also *Hays* v. *United States*, 123 F. 2d 53, 54 (C.A. 5), certiorari denied, 315 U.S. 801; *Rewis* v. *United States*, 242 F. 2d 508 (C.A. 5).

Guilt also attaches to one who assists the business by hauling the raw materials to the still or the finished product away from it. *Parente* v. *United States*, 82 F. 2d 722, 725 (C.A. 8); *United States* v. *Giuliano*, 263 F. 2d 582, 585 (C.A. 3).[13]

Similarly, those who contribute to the operation as suppliers or customers are guilty as principals in carrying on the business of a distiller. *Spencer* v. *United States*, 239 F. 2d 5, 7 (C.A. 5); *McIntire* v. *United States*, 217 F. 2d 663, 667 (C.A. 10), certiorari denied, 348 U.S. 953; *Vukich* v. *United States*, 28 F. 2d 666 (C.A. 9), certiorari denied, 279 U.S. 847; *United States* v. *Pritchard*, 55 F. Supp. 201 (D.S.C.), affirmed, 145 F. 2d 240 (C.A. 4).

In short, anyone present at an operating or operable still who has any connection with the enterprise is as liable as the owner or operator for the offense of carrying on the business of a distiller without

[13] In *Wainer* v. *United States*, 82 F. 2d 305, 307 (C.A. 7), certiorari granted, limited to a question not here material, 298 U.S. 652, and affirmed, 299 U.S. 92, it was held that an employee without proprietory interest may be held accountable as an aider and abettor in the carrying on, without payment of the required federal tax, of the business of a wholesale liquor dealer. As the court said (82 F. 2d at 307): "Obviously, a servant will aid and abet another in the carrying on of such business and become a principal if, with knowledge of the business, its purpose and its effect, he consciously contributes his effort to its conduct and promotion, however slight his contribution may be."

giving bond. Such a person obviously "helps" the distiller to "carry on the business."

The propriety of giving the offense of carrying on the business of a distiller without bond a broad interpretation, when read in conjunction with the aider-and-abettor statute, is confirmed by the elaborate detail in which Congress has interdicted every meaningful form of participation in, or assistance to, violations of the alcohol tax laws. No one at the site of a clandestine still, having any relation to the enterprise, could fairly argue that Congress did not mean to make his conduct criminal or that he lacked notice that his participation was a crime.

Thus, there are many provisions applicable to the owners and operators, besides section 5601(a)(4). Before a still is set up, a permit must be obtained (26 U.S.C. 5105(a)). Immediately thereafter, the distiller must register his still (§§ 5171(a), 5179) and, before distilling begins, he must obtain an operating permit (§ 5171(b); see, also, 27 U.S.C. 203(b)(1)), post a qualification bond (§ 5173; see, also, § 5222(a)(1)), and display a sign on the premises disclosing his name and occupation (§ 5180(a)). When production occurs, the distiller must pay the gallonage tax imposed (§§ 5001(a)(1), 5005(b)(1), 5006(c)(2)); and, before removal from the premises, the spirits must be transferred to stamped containers (§ 5205(a)(2)). For obvious reasons, the "moonshiner" ignores each of these requirements. So doing, he violates at least eleven specific criminal penalty provisions of the Internal Revenue Code: (1) possessing an unregistered still (§ 5601(a)(1)), (2) engaging in the busi-

ness of a distiller without having applied for registration (§ 5601(a)(2)), (3) carrying on the business of a distiller without having posted the required bond (§ 5601(a)(4)), (4) making mash on premises other than a licensed "distilled spirits plant" (§ 5601(a)(7)), (5) unauthorized production of distilled spirits (§ 5601(a)(8)), (6) bottling spirits with knowledge that the tax due has not been paid (§ 5601(a)(11)), (7) unauthorized removal of distilled spirits from the place of manufacture (§ 5601(a)(12)), (8) carrying on the business of a distiller with intent to defraud the United States of the tax due (§ 5602), (9) possessing, selling and transferring spirits in unstamped containers (§ 5604(a)(1)), (10) engaging in distilling without displaying the required sign (§ 5681(a)), and (11) possessing liquor and property used or intended for use in violation of the alcohol tax law (§ 5686(a)).[14] In some instances, perhaps, culpability attaches to the still owner alone. But it is well settled that the actual operator on the premises, whether as such or as an aider or abettor of the owner, is equally amenable to criminal sanctions as a "possessor" and as an unauthorized "distiller."

[14] The distiller may also be guilty of wilful tax evasion (26 U.S.C. 7201) or wilful failure to pay a tax or to keep required records (26 U.S.C. 7203). See, also, the civil tax penalties imposed by § 5684. Doubtless, the "moonshiner" ignores the statutory and regulatory provisions relating to records and reports (§ 5207(a), (c)), and thereby subjects himself to the penalties imposed by Section 5603, paragraphs (a)(1) and (b)(1). And, finally, he may be amenable to Section 5606 for disregarding the container regulations of the Secretary issued pursuant to Section 5301(a).

Employees of the distiller are not only punishable under the several provisions prohibiting the handling of any property or spirits appertaining to an illicit still (§ 5686(a); see, also, §§ 5601(a)(11), 5604(a)(1), 5606), but are subject to the criminal penalties imposed on all those who work at still where the required sign is not displayed (§ 5681(c)).

While, as we are informed, most "moonshiners" themselves transport their own equipment and raw materials to the still site, the supplier found on the premises is subject to the special provision which makes it a crime to knowingly "carry or deliver any grain, molasses, or other raw material to any distillery on which [the required] sign is not placed and kept" (§ 5681(c)), and to the general prohibition on "possess[ing] any * * * property intended for use in violating any provision of [the alcohol tax law]" (§ 5686(a)). It may also be noted that the provisions just recited are equally applicable to a mere carrier for the supplier.

The "moonshiner" does not normally sell his product at the still site. But, in any event, customers of an illicit distillery, besides liability for aiding or abetting its operation, are subject to other charges. Section 5681(c), cited against suppliers, likewise punishes everyone who "knowingly receives at, or carries or conveys any distilled spirits * * * from any [unposted] distillery." There are, moreover, express penal sanctions against "purchas[ing] [or] receiv-[ing] * * * any distilled spirits, knowing or having reasonable grounds to believe that any tax due on such spirits has not been paid or determined as re-

quired by law" (§ 5601(a)(11)), against "removing" any non-tax-paid liquor "from the place of manufacture" (§ 5601(a)(12)), and against "transport[ing], possess[ing], buy[ing] * * * or transfer[ring]" distilled spirits in an unstamped container (§ 5604(a)(1)). See, also, §§ 5601(a)(9)(A), 5686(a). Thus, even without invoking the aider and abettor statute, it is plain that customers of the distiller are guilty under the alcohol tax law.[15]

It will doubtless be argued, quoting the *Bozza* opinion, that "[t]he Internal Revenue Statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate crime" (330 U.S. at 163);[16] and the government, of course, must prove the crime charged. The provisions now gathered in Chapter 51 come from separate statutes enacted at different times. It is entirely clear that Congress used extreme care and many partially redundant provisions in order to be sure to make criminal every activity circumventing the alcohol tax. The specificity of some offenses, such as "making mash" has no tendency to prove that all are to be given a narrow interpretation. Section

[15] Most of the provisions cited carry the same penalty, $10,000 fine, 5 years' imprisonment, or both. See §§ 5601, 5602, 5603(a), 5604(a), 7201. It seems clear that each of the persons mentioned is amenable to one or more of these penalties, whether as aiders and abettors, or otherwise. Lesser penalties are imposed by Sections 5603(b), 5606, 5681, 5686(a), 5687, 7203, and 27 U.S.C. 207.

[16] While the relevant provisions have twice been recodified since the decision in *Bozza* (68A Stat. 595 (1954), 72 Stat. 1313 (1958)), the general scheme of fragmented offenses has remained unchanged.

5601(a)(4) obviously overlaps other offenses such as "making mash" (§ 5601(a)(7)) and possessing spirits in unstamped containers (§ 5604(a)(1)). There are many other, similar instances of duplication and overlapping. If consecutive sentences were imposed, or if a defendant were subjected to successive trials, serious problems of statutory construction and double jeopardy might be raised, but no such problems are presented here. The real significance of the network of related provisions is not that each crime must be narrow. It is that no one could be at a still except as a stranger without notice that his conduct was criminal. They also show that there is no chance that in giving section 5601(a)(4) the full scope warranted by the precedents, the Court would encompass conduct that Congress did not intend to proscribe.

2. The inference

Since the government, in order to convict under section 5601(a)(4) need prove only that the defendant was present and helping in some capacity in the maintenance or operation of an illicit still, or in deliverng supplies or carrying away distilled liquors, the constitutionality of the presumption created by section 5601(a)(2) depends upon whether proof of presence, along with common knowledge and experience, supplies a factual foundation from which a jury could rationally draw the inference, in the absence of some other satisfactory explanation of the defendant's presence, that he was there because he was thus helping in the enterprise. And since there is no need to find whether the defendant is a principal or acces-

sory, or in what capacity he is helping, the strength of the inference depends entirely upon whether other persons are likely to be present at the still.

We submit that there is no significant likelihood that any person not connected with or aiding the enterprise would be found present at the operation of an illicit still. Illicit stills are invariably clandestine. Since the success of the enterprise depends upon secrecy, and the penalties are heavy, the operators invariably keep to an absolute minimum the number of persons admitted to the premises. Employees and casual helpers, lookouts or guards, deliverers of sugar, grain and fuel, transporters of the alcohol, and perhaps a mechanic making repairs, might well be found there. Mere presence, of course, would not identify the capacity in which any one man was aiding or abetting the operation of the business; but that gap is irrelevant when the indictment is under section 5601(a)(4) because the aider and abettor would be equally guilty whatever his capacity. In the cities stills are operated illicitly in warehouse or industrial districts. The premises are closed to visitors. In the country stills operate in isolated areas. There are few passers-by. Any casual visitor is quickly discouraged. By accident a hunter, hiker or fisherman might stumble onto the still but the likelihood is very, very small. Other rural possibilities—a lost motorist or an airman who parachuted to safety—are even more remote. In the city one can imagine the premises being entered by a building inspector, an employee of a utility seeking to trace a breakdown, a process server or, perhaps, members of

a rival gang, but the chance that any one of them will be present is very small indeed. In either locale there is some chance that an operator of the still might stop at the premises accompanied by a friend or relative close enough to be trusted with such dangerous information, but the importance of secrecy is so great that even this possibility is relatively slight.

We must remember that the presumption operates only when the business is being "carried on."[17] That is not say that production must actually be taking place. But there must be signs that a "going business" is involved, albeit the apparatus is enjoying a normal respite. See *United States* v. *McGee*, 315 F. 2d 479, 481 (C.A. 6); *Rewis* v. *United States*, 242 F. 2d 508, 509, (C.A. 5); cf, *Liverman* v. *United States*, 260 F. 2d 284, 285 (C.A. 4). At such a time when operations are in process, it is especially unlikely that any stranger will be permitted to wander onto the premises, even if he should lose his way. It seems safe to say, therefore, that out of every hundred persons ever "present" when an illicit still is being operated, no more than one would be a stranger to the enterprise.

There is even less chance that anyone unconnected with the operation of the illicit enterprise would be found present at the time of the raid by revenue agents or local police. Innocent visits or intrusions would always be brief. Only by extraordinary mis-

[17] The phrase "carrying on the business" is not defined because it has its normal meaning. *Ramsey* v. *United States*, 245 F. 2d 295, 297 (C.A. 9); cf. *Kahn* v. *United States*, 251 F. 2d 160, 162 (C.A. 9), certiorari denied, 356 U.S. 918.

chance would the rare innocent visit coincide with the raid by enforcement officials.

Under such circumstances it is entirely reasonable to authorise a jury to draw from unexplained presence an inference of participation, and therefore of guilt. Indeed, such an inference would be permissible, and would often be drawn, in the absence of legislation.

We recognize, of course, that cases can be imagined in which the circumstances make the normal inference impermissible. It might be arbitrary, for example, to allow a jury to convict a defendant under section 5601(a)(4) where the only evidence against him was that he was present on a path running past the back door of a rural still carrying a fly-rod, waders and a creel, and headed towards a brook.[18] In such a case, however, the very proof of the defendant's presence furnishes the facts constituting necessary

[18] Cf. *Vick* v. *United States*, 216 F. 2d 228, 230 (C.A. 5), where the government's own evidence revealed that, while others were working at the still, the defendant was "sitting on the ground in the vicinity of the distillery"; that there was a regular trail leading to the distillery which itself was located in the middle of a good hunting country; and that the defendant was in possession of a hunting rifle. A co-defendant testified that Vick, who was related to others operating the still, had been there but a short time and had done nothing at the still but take a drink. See *McFarland* v. *United States*, 273 F. 2d 417, 419 (C.A. 5), *Ingram* v. *United States*, 241 F. 2d 708, 709 (C.A. 5), and *Corbin* v. *United States*, 253 F. 2d 646, 650 (C.A. 10), explaining *Vick* as ruling that the defendant's presence at the still had been satisfactorily explained.

There was also a plausible explanation for presence at the still site in *Graceffo* v. *United States*, 46 F. 2d 852 (C.A. 3), and *Cantrell* v. *United States*, 158 F. 2d 517 (C.A. 5). Cf. *Girgenti* v. *United States*, 81 F. 2d 741 (C.A. 3).

explanation; the jury could not rationally find it unsatisfactory, and the court should enter a judgment of acquittal. Since all the other extreme cases can apparently be handled in like fashion, there appears to be no danger that the statutory presumption created by section 5601(b)(2) would ever require the court to permit the jury to convict even though the inference upon which its verdict would rest was patently unreasonable under the particular circumstances. Should such a case arise, it would be time enough to consider the constitutionality of section 5601(b)(2) as applied to that defendant. The present case is manifestly different.

For the foregoing reasons we urge that the presumption created by section 5601(b)(2) does no more than authorize the jury to draw an entirely reasonable inference from proven facts. But even if one disagreed with Congress concerning the force of the inference, the constitutionality of the statute should be sustained because, surely, Congress, upon the facts available to it, could reasonably conclude that the inference was permissible. The country has had experience with illegal distilling operations since the founding of the Republic [19] and they continue on a large

[19] The first "moonshiners" were presumably those who provoked the "Whiskey Rebellion" of 1794, after the first federal tax on domestic distilleries and distilled spirits was imposed. See Act of March 3, 1791, §§ 14, 15, 21, 1 Stat. 199, 202, 203, 204. See, also, the Act of July 24, 1813, 3 Stat. 42, construed in *United States* v. *Tenbroek*, 2 Wheat. 248. The present comprehensive alcohol tax provisions derive, for the most part, from the Act of July 20, 1868, 15 Stat. 125. See, *e.g.*, *United States* v. *Singer*, 82 U.S. (15 Wall.) 111; *United States* v. *Simmons*, 96 U.S. 360. For the antecedents of the substantive

scale."[20] We are informed by the Internal Revenue Service that, in most instances, illegal distilleries are operated in locations where observation and surveillance are very difficult and that, frequently, lookouts are employed who, by means of buzzer systems or other similar methods, signal their co-workers of the approach of government agents and thereby give sufficient advance notice of a pending raid. This permits the discontinuance of overt illegal activity, although it does not provide sufficient time to escape. The net effect is that, when the officers come upon the still, they find that, while numerous persons are present, none are actually working. In a word, it is wholly

---

penal provisions here involved, see §§ 5 (possession of an unregistered still) and 44 (carrying on the business of a distiller without having posted bond) of the 1868 Act, 15 Stat. 126. 142–143.

It is interesting to note that there was a presumption incorporated in the first alcohol tax law. After taxing country stills "employed" in the manufacture of distilled spirits (Act of March 3, 1791, § 21, 1 Stat. 199, 204), that statute provided (*id.*, § 22): "That the evidence of the employment of the said stills shall be, their being erected in stone, brick or some other manner whereby they shall be in a condition to be worked."

Despite extended and heated debate in the First Congress (which included Madison and the other draftsmen of the Bill of Rights) over the adoption of a measure taxing domestic spirits, no one seems to have objected to this provision. See, *e.g.*, 2 Ann. of Cong. 1842–1845, 1846–1852, 1852–1853, 1857–1861, 1870–1872, 1873–1875, 1876–1878, 1880–1882. See, also *id.*, at 1551–1552, 1633–1634, 1636–1638, 1642–1644, 1751, 1752, 1753, 1754–1755, 1761–1762, 1764–1765, 1769, 1770–1771, 1838, 1862, 1879, 1883, 1884, 1963, 1963–1964, 1966, 1968, 1969, 1971.

[20] Official figures provided by the Alcohol and Tobacco Tax Division of the Internal Revenue Service show that from 1958 through 1963, some 37,440 illegal stills have been seized by enforcement agents.

contrary to reality to say, as did the court below, that the presumptions are unreasonable because they fail to take into account the fact that the innocent as well as the guilty may be found at the site of an illegal still (322 F. 2d at 300). Congress could validly accept the judgment of those charged with every day enforcement of the liquor laws that presence at a still site when the business of distilling is going on is a meaningful signal of criminal association with the illegal enterprise.

II

SECTION 5601(b)(1) IS CONSTITUTIONAL

Count One of the indictment charged the defendants under section 5601(a)(1), which declares guilty of a criminal offense any person who—

> Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered * * *

Section 5601(b)(1) provides that proof that the defendant was "at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered"[21] shall be sufficient evidence to authorize conviction unless the defendant explains his presence to the satisfaction of the jury.

[21] A still is "set-up" under the statute when, though some minor adjustment may be necessary, it is essentially capable of immediate operation. See *United States* v. *Moses*, 205 F. 2d 358, 359 (C.A. 2); *Otto* v. *United States*, 29 F. 2d 504, 505 (C.A. 7); *United States* v. *Cafero*, 55 F. 2d 219, 220 (C.A. 2); *Colasurdo* v. *United States*, 22 F. 2d 934, 935 (C.A. 9). Unless a still is "set up" within these standards, the registration requirements of the statute do not apply. *Liverman* v. *United States*, 260 F. 2d 284, 286 (C.A. 4).

In *Bozza* v. *United States*, 330 U.S. 160, 163–164, this Court gave the substantive offense of possessing an unregistered still a rather narrow construction, pointing out that while such offenses as illicitly carrying on the business of a distiller embraced a broader class, the offense of possession could not be extended beyond those who had the actual "custody or possession" or who acted "in any other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout, or in some similar capacity." The court of appeals followed that definition (R. 64–65). If it is current law, the inference from the mere fact of presence at a still when it is set up to the conclusion that the defendant committed acts constituting this substantive crime may well be too tenuous to satisfy the Fifth Amendment, for it is not at all unlikely, as *Bozza* shows, that a person found on the premises, even at an operative still, is a supplier, a customer, or a workman aiding in the operation but neither having nor aiding possession or custody in the narrow sense. Such a presumption, moreover, might be thought to put an unjust burden upon the defendant, for to give the most likely explanations of presence consistent with innocence under section 5601(b)(1) would be to admit his guilt of crimes under other provisions of the alcohol tax laws (See pp. 22–25 *supra*).

We submit, however, that the narrow definition given to "possession" in *Bozza* was overruled and the substantive crime was redefined by the 1958 amendments in such a way as to include all those present at an operable still in connection with the illicit

enterprise. All those present and connected with the enterprise are, in a very substantial sense, assisting in the enterprise's possession, custody or control and if that is now the meaning of "possession," as we think it is, then the unlikelihood that anyone else would be present is sufficient to sustain the constitutionality of the presumption under the principles stated in Point I.

At first blush this may seem a large burden to rest upon the 1958 amendments.[22] In language and form they added only the presumption created by section 5601(b)(1) and left the words of section 5601(a)(1) untouched. But the definition of "possession" is not in the statute and the meaning of Congress must be derived not only from the words of section 5601(a)(1) but also from its context and other evidence of congressional intent. And the result is plainly what Congress intended. The legislative history is explicit that the provisions in suit were "designed to avoid

[22] A somewhat similar contention was rejected in *Tot* v. *United States*, *supra*, 319 U.S. at 472, partly on the ground that it did not jibe with the legislative purpose. There, the government's argument was that, since Congress might have prohibited the possession of firearms by ex-felons, whether or not acquired in interstate commerce, there could be no objection to a mere presumption that the weapon was purchased from interstate commerce. Pointing out that this reasoning, in any event, did not support the presumption of acquisition after the effective date of the Act, the Court added: "it is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce." The critical difference here is that, in the present instance, the congressional intent to broaden the offense seems plain.

the effect of [this Court's] holding [in *Bozza* v. *United States*] as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 189; H. Rep. No. 481, 85th Cong., 1st Sess., p. 175.[23] Read against the ruling in *Bozza* that a helper of the distiller could not be deemed to "possess" the still, Congress seems here to be saying, as respects the offense of possession: "the Court notwithtanding, henceforth, not only actual custodians, but all those connected by physical

[23] These Reports relate to the many changes worked by the Excise Technical Changes Act of 1958 and focus only briefly on the new statutory presumptions added. In identical language borrowed from an analysis prepared by the Alcohol and Tobacco Tax Division of the Internal Revenue Service (see *Hearings Before a Subcommittee of the House Committee on Ways and Means on Excise Tax Technical and Administrative Problems* Part I, 84th Cong., 1st Sess., p. 208; see also *Hearings*, id., Part III, p. 95), the relevant portions of the House and Senate reports read:

"* * * These paragraphs are new. Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in *Bozza* v. *United States* (330 U.S. 160).

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

"In the Bozza case, the Supreme Court took the position that to sustain conviction, the testimony 'must point directly to conduct within the narrow margins which the statute alone defines.'. These new provisions are designed to avoid the effect of that holding as to future violations."

proximity to the distillery, and not present by mere innocent accident, shall be considered to 'possess' it."

There can be no serious doubt as to the legitimacy of the end in view. We have already noticed that all those who have anything to do with an illicit distillery are in fact amenable to the alcohol tax law. It cannot be wrong to hold them as aiders and abettors in "possession," rather than on another offense. Labels are not so sacred. In any event, the term is subject to that broad construction (cf. *United States* v. *Rappy*, 157 F. 2d 964, 966–967 (C.A. 2, L. Hand, J.), certiorari denied, 329 U.S. 806; *United States* v. *Santore*, 290 F. 2d 51, 76–78 (C.A. 2), certiorari denied, 365 U.S. 834), and no violence is done if Congress chooses to view those who work at a still, or do business with it, as accessories to its "possession." Nor can there be any real claim of surprise. Everyone knows (or is presumed to know) that involvement with an illicit still is a criminal offense. Adequate warning has been given. That the crime is now termed "possession" does not invalidate the notice.

As applied to such an enlarged concept of possession, the inference derived from presence is, of course, wholly reasonable. By hypothesis, all those at the still for business reasons are deemed possessors, and, as we have already noted, no one else is at all likely to be there. For the remote case of the stray wanderer who happens upon an operative still, the opportunity for explanation is sufficient protection, either by way of rebuttal or because the explanation is apparent from the government's case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals reversing respondent's conviction on Counts 1 and 2 should be reversed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

AUGUST 1964.

APPENDIX

Provisions of the alcoholic tax chapter of the Internal Revenue Code (26 U.S.C.) creating presumptions similar to those involved in this case and enacted at the same time (72 Stat. 1398, 1410).

1. *Unlawful production, removal or use of material fit for production of distilled spirits.*

Substantive provision (§ 5601(a)(7)):

> Except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled; * * *

Presumption (§ 5601(b)(3)):

> Whenever on trial for violation of subsection (a)(7) the defendant is shown to have been at the place in the building or on the premises where such mash, wort, or wash fit for distillation or the production of distilled spirits, was made or fermented, and at the time such mash, wort, or wash was there possessed, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

2. *Unlawful production of distilled spirits.*

Substantive provision (§ 5601(a)(8)):

> Not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or any other process from any mash, wort, wash, or other materials; * * *

Presumption (§ 5601(b)(4)):

> Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

3. *Premises where no sign is placed or kept.*

Substantive provision (§ 5681(c)):

> Every person who works in any distillery, or in any rectifying, distilled spirits bottling, or wholesale liquor establishment, on which no sign required by section 5115(a) or section 5180 (a) is placed or kept, and every person who knowingly receives at, or carries or conveys any distilled spirits to or from any such distillery, or to or from any such rectifying, distilled spirits bottling, or wholesale liquor establishment, or who knowingly carries or delivers any grain, molasses, or other raw material to any distillery on which said sign is not placed and kept, shall forfeit all vehicles, aircraft, or vessels used in carrying or conveying such property and shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Presumption (§ 5681(d)):

> Whenever on trial for violation of subsection (c) by working in a distillery or rectifying

establishment on which no sign required by section 5180(a) is placed or kept, the defendant is shown to have been present at such premises, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

U.S. GOVERNMENT PRINTING OFFICE: 1964